

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

NO. 77-4001

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SCIENTIFIC PEST CONTROL CORPORATION; LOCAL 522,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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A. The first part of this reply brief is addressed to certain matters raised in Teamster Local 522's brief:

1. In urging that Mark and Joseph Giordano, the two teenage sons of the Company's sole stockholders, should not have been excluded from the unit, Local 522 (Br. 6) disregards the axiomatic principle that Congress has entrusted the Board with a wide degree of discretion in determining the makeup of the unit. Section 9(b) of the Act provides that, in determining the scope of the appropriate unit in each case, the Board shall seek "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act. . . ." A determination

under Section 9(b) "involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed." Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 491 (1947). Accord: N.L.R.B. v. George J. Roberts & Sons, Inc., 451 F. 2d 941, 948 (C.A. 2, 1971); Wheeler-Van Label Co. v. N.L.R.B., 408 F. 2d 613, 616-617 (C.A. 2, 1969), cert. denied, 396 U.S. 834.

In conformity with the principles approved in the above-cited cases, the Board has long excluded from the appropriate unit those employees who lack sufficient interests in common with the employees included in the unit. The Board early decided in this connection that the familial bond between an employer and employee is in certain cases so close as to remove the near relative from the "community of interest" shared by the other employees. N.L.R.B. v. Caravelle Wood Products, 504 F. 2d 1181, 1184 (C.A. 7, 1974) (Caravelle II), petition for rehearing denied, 510 F. 2d 257 (C.A. 7, 1974). Although the Board and the courts have recognized that the mere existence of a family relationship does not automatically exclude the possibility of a community of interest, they have also upheld the exclusion of employees from the unit upon various reasonable grounds, including family relationship to the owners of the business. Caravelle II, supra, 504 F. 2d 1185-1188; Cherrin Corp. v. N.L.R.B., 349 F. 2d 1001, 1004 (C.A. 6, 1965), cert. denied, 382 U.S. 981; Uyeda v. Brooks, 365 F. 2d 326, 329-31, 1966). ^{1/}

^{1/} As pointed out in Caravelle II, supra, 504 F. 2d at 1184-1185, the Board initially excluded employees from the unit purely because of their family relationship but later determined that relatives of the employer should

The exclusion of Mark and Joseph Giordano from the unit in this case was in accord with these principles. As the Board found, and as shown in the Board's opening brief, p. 21, they are the minor sons of Salvatore and Mary Giordano, the sole owners of the Company; they were still in school and worked only on Saturdays, school holidays and other occasions, as directed by their father; they cleaned offices and trucks or did whatever other jobs their father found needed to be done (A. 351-352); and the record shows they earned \$16 for 8 hours work in one pay period (A. 415-416). Thus, they worked intermittently, for minimal pay, on maintenance chores or odd jobs around the office, at the direction of their father, a self-described "dictator" (A. 310), who plays an active role in the management of the Company and the formulation of its labor relations policies. By contrast, the unit employees, who are not related to the Giordanos, perform pest control services for customers away from company premises, on established routes and daily runs, at least five days a week at weekly salaries of \$110 to \$125 (A. 352; 43-44, 96-97, 153, 269, 277).

In these circumstances, the Board reasonably concluded that Mark and Joseph Giordano, "as the children of the owners of the company and not being employed in the same way or manner as the other employees," lack

1/ be excluded only where they enjoyed a special employment status as a result of that relationship. See Cherrin Corp. v. N.L.R.B., *supra*, 349 F. 2d at 1004; N.L.R.B. v. Jackson Farmers, Inc., 432 F. 2d 1042, 1044 (C.A. 10, 1970). More recently, at the suggestion of the Seventh Circuit in Caravelle I, the Board applied an "expanded community of interest standard," which permits the exclusion from the unit of family members--without evidence that they enjoy special job-related benefits--on the basis of such factors as their living with and being economically dependent on relatives who own or manage the business and a high degree of family ownership and involvement in the active management of the company. See Caravelle II, 504 F. 2d at 1186-1188, 510 F. 2d at 258.

a "community of interest" with the others and should, therefore, be excluded from the unit (A. 352). This determination was a proper exercise of the Board's discretion under Section 9(b) of the Act, for it is neither arbitrary nor capricious and does not represent an automatic or per se exclusion of employees solely because they have some family relationship to the owners and officers of a corporation. See N.L.R.B. v. Caravelle Wood Products, supra, 504 F. 2d at 1183-1184, 1186-1188. See also N.L.R.B. v. Certified Testing Laboratories, 387 F. 2d 275, 277-278 (C.A. 3, 1967); Wheeler-Van Label Co. v. N.L.R.B., supra, 408 F. 2d at 616-617.^{2/}

2. Teamster Local 522 (Br. 8-9) challenges the appropriateness of the Board's remedy (A. 383, 371-372) requiring it and the Company jointly and severally to reimburse all present and former employees who became members of Local 522 on and after September 12, 1974. September 12 is the date that the Company, in violation of Section 8(a)(2) of the Act, recognized Local 522 at a time when it lacked an uncoerced majority, and Local 522, in violation of Section 8(b)(1)(A), unlawfully accepted such recognition. On the following day, September 13, the Company agreed to a union security contract with Local 522, and on and after that date the Company deducted monies from the wages of its employees as a condition of their employment and paid those monies to Local 522. By entering into and enforcing this union security agreement

^{2/} The Board did not find that Mark and Joseph Giordano, as the children of the sole owners of a closed corporation, are excluded from the statutory definition of "employee," under Section 2(3) of the Act, and that issue is not presented here. Cf. N.L.R.B. v. Caravelle Wood Products, 466 F. 2d 675, 676-678 (C.A. 7, 1972) (Caravelle I).

the Company violated Section 8(a)(2) and (3) of the Act and Teamster Local 522 violated Section 8(b)(2) and (1)(A). See the Board's main brief, pp. 7-8, 21-23.

The dues reimbursement remedy which Teamster Local 522 now challenges was part of the remedial order recommended by the Administrative Law Judge in his decision (A. 371-372). Although both Local 522 and the Company filed exceptions to the Judge's decision with the Board, neither contended that the recommended order was an inappropriate remedy for the violations found. Accordingly, pursuant to Section 10(e) of the Act,^{3/} Local 522's belated contention is not properly before the Court. See N.L.R.B. v. Local 3, International Brotherhood of Elec. Wkrs., 362 F. 2d 232, 234-235 (C.A. 2, 1966); N.L.R.B. v. Park Edge Sheridan Meats, Inc., 323 F. 2d 956, 959 (C.A. 2, 1963); N.L.R.B. v. Enterprise Association, etc., 285 F. 2d 642, 646-647 (C.A. 2, 1960).

In any event, even if Local 522 had challenged the Administrative Law Judge's recommended order in timely fashion, the Board could reasonably have concluded that the dues reimbursement order was appropriate. As this Court stated in N.L.R.B. v. Adhesive Products Corp., 258 F. 2d 403, 409 (1958), "The validity of reimbursement orders necessarily depends upon the peculiar circumstances of each particular case." The critical inquiry is whether there is a causal relationship between the unfair labor practices found and the payment of dues, since where the payment is coerced, repayment is necessary in order to place the affected employees in the same position they would have been in had the statute been obeyed. See N.L.R.B. v. Vernitron Electrical

^{3/} Section 10(e) of the Act provides, in relevant part, that "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

Components, Inc., 548 F. 2d 24, 27 (C.A. 1, 1977); N.L.R.B. v. Cadillac Wire Corp., 290 F. 2d 261, 263 (C.A. 2, 1961).

With respect to the employees who joined and paid dues to Teamster Local 522 following the execution and enforcement of the union security contract, the requisite coercion may be inferred from the fact that they made these payments after being informed that they were bound by an agreement which conditioned their continued employment on membership in Local 522. See Sheraton-Kauai Corp. v. N.L.R.B., 429 F. 2d 1352, 1357-1358 (C.A. 9, 1970); Komatzen Construction, Inc. v. N.L.R.B., 458 F. 2d 317, 323-324 (C.A. 8, 1972). Such an inference is particularly appropriate here. As shown in our main brief, pp. 3-8, 26-28, nine of the Company's employees had previously signed cards for a different union, Local 155, and the unlawful entering into and enforcing of the union security contract with Teamster Local 522 was the culmination of the barrage of unfair labor practices to which their employer subjected them.^{4/}

Nor was the Board required to reach a different result with respect to the 11 employees who signed cards for Teamster Local 522 on September 12, prior to the execution of the union security agreement. As stated with regard to a similar issue in N.L.R.B. v. Revere Metal Art Co., 280 F. 2d 96, 101 (C.A. 2, 1960), cert. denied, 364 U.S. 894:

^{4/} In view of the Company's prior unfair labor practices, this is not a case where it can be said that in entering into the union security agreement both parties were acting entirely in good faith and that there is no evidence that the unfair labor practices coerced employees into joining one union rather than another. Accordingly, there is no occasion for the Court to decide whether, in the absence of such evidence, it would approve a reimbursement remedy. Compare Sheraton-Kauai v. N.L.R.B., *supra*, and Komatzen Construction, Inc. v. N.L.R.B., *supra*, with N.L.R.B. v. Masters-Lake Success, Inc., 287 F. 2d 35, 36 (C.A. 2, 1961).

Though the Board might have excluded the employees who voluntarily signed union cards [prior to the date of the commencement of the unlawful activity] it did not abuse its discretion in not doing so since these employees may well have remained in the union only because of the status it had unlawfully acquired. For the courts to require a determination of the attitude of each employee in every case would impose impossible administrative burdens.

Accord: N.L.R.B. v. Cadillac Wire Corp., supra, 290 F. 2d at 263.

Moreover, one of the employees, Page, who signed a card for Teamster Local 522 on September 12 had previously signed a card for Local 155, and as shown in our main brief, pp. 19-20, it is reasonable to attribute his change of heart to the Company's unfair labor practices. Furthermore, in view of those same unfair labor practices, and in view of the Company's precipitate recognition of Teamster Local 522 shortly after Giordano warned employees that he would prevent Local 155 from ever getting in his shop, the Board could reasonably infer that other card signers were also coerced.

B. The remaining portion of this reply brief is devoted to the contentions of the Company.

1. The Company, abandoning the various arguments which it advanced before the Board and which were discussed in the Board's main brief, now addresses itself to a single issue: that the Board acted improperly in ordering the Company to reinstate employees Raupp and Balz at its St. James, Suffolk County, location and in ordering the Company to reimburse these two employees for any loss of pay which they may have suffered as a result of their unlawful separation from employment at that location. As we show below, the Company's contentions are without merit.

Section 10(c) of the Act empowers the Board to devise appropriate remedies to effectuate the policies of the Act. This function is "peculiarly a matter for administrative competence" (Phelps-Dodge Corp. v. N.L.R.B., 313 U.S. 177, 194 (1941)), and the Board's order should not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Electric and Power Co. v. N.L.R.B. 319 U.S. 533, 540 (1943). No remedial principle is clearer than that restoration of the status quo ante tends to effectuate the policies of the Act. See, e.g., Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 215-216 (1964); N.L.R.B. v. Rutter-Rex Mfg. Co., 396 U.S. 253, 265 (1969).

As shown in the Board's main brief, pp. 23-24, in the present case, the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Balz and Raupp from its St. James, Suffolk County, location because they refused to become members of Teamster Local 522, as required by the unlawful union security agreement. The Company subsequently offered Balz and Raupp employment at its Port Washington, Nassau County, location, which both employees found less convenient. Since the Company unlawfully separated the employees from their former, more convenient place of employment, the Board reasonably determined that the appropriate remedy was to require their reinstatement at that former location. As the Board stated, "[O]nly such reinstatement without loss of pay can serve to restore the status quo and reassure the employees of their statutory right to remain secure in their employment, free from reprisals however they choose to exercise the rights

guaranteed them by Section 7 of the Act" (A. 379). As the Board further observed, the Company's claim that it rehired Balz and Raupp at Port Washington rather than at St. James because their return was opposed by adherents of Teamsters Local 522 ignores the Company's obligation to resist such pressures and underscores the need for the remedy which the Board selected (A. 379-380).

2. Contrary to the Company's contention (Br. 5-6), the appropriateness of the Board's reinstatement and backpay order is not lessened because Balz and Raupp were subsequently terminated at the Port Washington, Nassau County, location as a result of their failure to secure salesmen's licenses. Nothing in the record indicates that the licensing requirement was applicable at the St. James, Suffolk County, location where the employees had previously been employed. Accordingly, as the Board stated, "It is not established in the record that Balz and Raupp would have suffered the same fate had they remained employed at St. James" (A. 380). The Company's assertion that the Board was wrong, and that the licensing requirement was "county-wide in scope" (Br. 5), simply fails to take account of the fact that St. James and Port Washington are located in different counties (A. 351; 394, 406).

The Company's argument is further deficient in that it overlooks that its liability for backpay arises from its initial act in wrongfully separating Balz and Raupp from their employment at St. James. The law is clear that the "finding of an unfair labor practice and discriminatory discharge is presumptive proof that some backpay is owed" (N.L.R.B. v. Reynolds, 399 F 2d 668, 669 (C.A. 6, 1968)) and, until the wronged employees have been restored to their former jobs, the question of whether they have unreasonably failed to accept

or retain available interim employment -- such as that at Port Washington -- is relevant only to the question of whether they have incurred a willful loss of earnings -- a fact which would reduce, but not destroy the Company's liability. See Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 197-200 (1941). The burden of establishing such a willful loss of earnings is on the Company, and it is clear that discriminatees need not accept or retain distasteful interim employment simply to reduce an employer's liability for its unlawful conduct. Florence Printing Co. v. N.L.R.B., 376 F. 2d 216, 220-221 (C.A. 4, 1967), cert. denied, 389 U.S. 840; N.L.R.B. v. Miami Coca-Cola Bottling Co., 360 F. 2d 569, 575 (C.A. 5, 1966); N.L.R.B. v. Mastro Plastics Corp., 354 F. 2d 170, 179 (C.A. 2, 1965), cert. denied, 384 U.S. 972. Moreover, such issues are a matter for later proof before the Board in a backpay proceeding, and consideration of them now is premature. Under long-established principles, what is at stake now is the Company's liability to reinstate the two employees with backpay, not the amount of that liability. See Home Beneficial Life Ins. Co. v. N.L.R.B., 172 F. 2d 62, 63 (C.A. 4, 1949); N.L.R.B. v. Lamar Creamery Co., 246 F. 2d 8, 10 (C.A. 5, 1957).

3. The Company contends that the General Counsel conceded that its rehiring of Balz and Raupp at Port Washington constituted a full and complete reinstatement of them, and it asserts that the Board improperly ruled otherwise. It also suggests that the Board, in effect, is improperly requiring it to defend itself against matters not raised in the complaint. This contention is deficient for several reasons.

Initially, even assuming that the General Counsel clearly and deliberately made the concession which the Company understood him to make, this concession would not be binding on the Board. As shown, supra, pp. 8-9, the issue here is the appropriate remedy for the violation which the General Counsel established, and under Section 10(c) of the Act, it is the Board which is given the responsibility of devising remedies which will effectuate the policies of the Act. As shown, the remedy which the Board selected is appropriate. The fact that the General Counsel might have expressed a different view does not make it any less appropriate.

Furthermore, the concession upon which the Company relies is equivocal at best. As the Company acknowledges (Br. 2), the General Counsel's complaint alleges that that Company's transferring Balz and Raupp from St. James to Port Washington was discriminatory and a violation of Section 8(a)(1),(2), and (3) of the Act (A. 400-402). Thus, from the beginning of the case, the Company was on notice that the General Counsel was contending that Balz's and Raupp's presence at Port Washington was the direct result of an unfair labor practice. Such a contention hardly suggests that the General Counsel believed that the transfer constituted full reinstatement and satisfied all the Company's obligations to the wronged employees. Additionally, since the General Counsel did not make his alleged concession until his closing statement (A. 326, 331-332), this concession obviously had no effect on the Company's decisions as to what evidence it should introduce at the hearing, and the Company, although asserting that it relied on the General Counsel's concession, has made no claim or showing that it was prejudiced by that reliance.

Finally, it is noteworthy that the General Counsel made the alleged concession in the context of an argument that the Company's placing Balz and Raupp at the Port Washington facility was an unfair labor practice (A. 331). In this circumstance, it is doubtful whether the General Counsel intended to concede that the Company satisfied its reinstatement and backpay obligations by such action. Indeed, the General Counsel filed exceptions to the Administrative Law Judge's finding (A. 361) that "the General Counsel makes no contention that the reinstatement [at Port Washington] was other than full reinstatement for both Balz and Raupp. . .", and it was this exception which precipitated the Board remedy about which the Company now complains. The General Counsel's action was undoubtedly disappointing to the Company, but in the context of the case as a whole, it hardly constituted the unfair surprise which the Company now suggests.

For the foregoing reasons, and for the reasons set forth in the Board's opening brief, we respectfully submit that the Board's order should be enforced in full.

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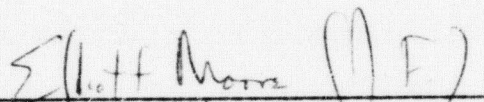
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Board's Reply Brief, in the above-captioned case, have this day been served upon the following counsel at the addresses listed below:

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Dated at Washington, D.C.

this 13th day of May, 1977.